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In the

Supreme Court of the United States

STANDARD BRANDS, INC., *Petitioner,*

vs.

J. F. BATEMAN, J. W. GALBRATH, E. J. DAVIS, JAMES H. MOORE AND C. H. BENBON, Statutory Trustees for Batemore, Inc., a Dissolved Corporation, *Respondents.*

No.....

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioner prays certiorari to review a judgment of the Court of Appeals for the Eighth Federal Circuit entered on November 13, 1950.

Opinion Below.

The judgment of the Federal District Court was entered without opinion. The opinion of the Court of Appeals was written by Judge Thomas on November 13, 1950, and is set out in the record (R. 336-353).

Federal Jurisdiction.

Federal jurisdiction is based upon the fact that there is complete diversity of citizenship and the amount involved exceeded the statutory requirement for Federal jurisdiction.

Jurisdiction of the Supreme Court.

The judgment of the Court of Appeals was entered on November 13, 1950, against the petitioner. Petition for rehearing was denied on December 5, 1950 (R. 379). Jurisdiction of this court is invoked under Title 28, U. S. C., Sections 1254 and 2101 (c) of the new Judicial Code, effective September 1, 1948.

Summary and Statement of the Matter Involved.

Standard Brands, Inc., your petitioner, owned and occupied a building in Kansas City, Missouri. This building was sold on December 12, 1945, to Batemore, Inc., and at the same time the new owner executed a lease for three years to Standard Brands, Inc., as tenant (R. 36).

On June 26, 1946, the building was damaged by fire. Batemore, Inc., carried fire insurance in two companies and the two fire insurance companies settled their liabilities under the policies for $39,875 (R. 304, 158, 159). The two fire insurance companies then brought suit in the name of Batemore, Inc., against Standard Brands for $39,875. The lease was set out in full as Exhibit A to the complaint (R. 2).

Batemore, Inc., then was dissolved, so the two fire insurance companies filed an amended complaint in the name of the statutory trustees of that dissolved corpora-

tion. The lease was again incorporated in toto in this amended complaint by reference (R. 2).

The lease provided that fire loss was to be repaired by the landlord (R. 40), and fire insurance was carried by the landlord. Standard Brands in its answer, therefore, alleged that the amended complaint, which included the lease, failed to "state facts sufficient to entitle the plaintiffs to any relief or judgment against this defendant" (R. 6).

Standard Brands also filed a third party complaint in the action against Midwest Refrigeration, Inc., as third party defendant, setting out that the fire loss was caused by the negligence of an employee of the third party defendant in repairing the air-conditioning equipment (R. 8). The plaintiffs did not include Midwest as an additional defendant.

The case was tried to a jury. The lease was introduced in evidence by the plaintiffs (P's. Exhibit 19, R. 37). Standard Brands in the testimony of its witnesses showed that the fire was caused by the negligence of an employee of Midwest in repairing a pressure switch on the air-conditioning unit. The cause of the fire is not in dispute. At the conclusion of the testimony, both Standard Brands and Midwest moved for directed verdicts. The motion for a directed verdict of Standard Brands included as one basis for its allowance that the terms of the lease precluded a recovery against it (R. 306). The court sustained the motion of Midwest and overruled the motion of Standard Brands (R. 320, 327).

The court then instructed the jury that Standard Brands was liable to the plaintiffs for the negligence of the employee of Midwest (R. 318). This negligence had been established by Standard Brands and the testi-

mony of its witnesses. The jury returned a verdict for $39,875 and costs against Standard Brands (R. 323).

Standard Brands then moved for judgment notwithstanding the verdict or in the alternative for a new trial. The motion was based upon the reasons for a directed verdict included in its motion for a directed verdict (R. 325). The trial court overruled the motion. The trial court also overruled the motion of Standard Brands for a new trial against Midwest.

The case was then appealed to the Circuit Court of Appeals for the Eighth District. Standard Brands filed its points on which it intended to rely on appeal and included therein the point that the trial court had erred in failing to sustain defendant's motion for directed verdict (R. 332).

The Circuit Court of Appeals affirmed the judgment against Standard Brands on the ground that paragraphs 2 and 3 of the lease required the tenant to repair and that the tenant was liable for fire loss caused by the negligence of an independent contractor while making those repairs. The court ordered a new trial of the third party case of Standard Brands against Midwest (R. 353, 4).

Paragraph 7 of the lease set out in plaintiff's complaint and evidence provided that the landlord should repair fire damage.[1] The opinion of the Circuit Court of Appeals held that paragraph 7 of the lease could not be

[1] "7. In case of fire, the tenant shall give immediate notice thereof to the landlord who shall thereupon cause the damage to be repaired with reasonable speed * * *."

considered, since it had not been properly raised in the answer or asserted in the trial court.[2]

Standard Brands is herein petitioning for certiorari to review the judgment of the Court of Appeals in favor of the plaintiffs and against Standard Brands. We are advised that Midwest also is filing a petition for certiorari to review the judgment of the Court of Appeals in ordering a new trial in the third party action of Standard Brands against Midwest.

Questions Presented.

A.

Did the Court of Appeals follow the principles established by the Supreme Court of the United States in holding that provisions of a lease defeating recovery must be affirmatively pleaded in the answer, even though the lease is set out in full by reference in the amended complaint, introduced in evidence by the plaintiffs, and liability predicated on other provisions of that same lease?

B.

Does the judgment of the Court of Appeals for the Eighth Circuit conflict with the case of *Anderson &*

[2](R. 345) "In its reply brief defendant contends that it is not absolutely liable for failure to maintain the interior of the rented building because under paragraph 7 of the lease between the parties plaintiff landlord is required to repair fire damage. This contention was not pleaded in the answer or otherwise asserted in the trial court. No ruling thereon by the trial court is shown nor properly raised in this court. The question cannot, therefore, properly be said to be before us. *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456, 496; *Hall* v. *Aetna Life Ins. Co.*, 8 Cir., 85 F. 2d 447, 452; *Columbia Pictures Corporation* v. *Lawton-Byrne-Bruner Ins. Co.*, 8 Cir., 73 F. 2d 18, 20; *American Surety Co.* v. *Republic Casualty Co.*, 8 Cir., 42 F. 2d 807, 810; *Taylor* v. *Taylor*, 232 S. W. 2d 382, ... Mo. ...."

Brown Co. v. *Anderson,* 161 F. 2d 974 (C. C. A. 7th, 1947) in construing Rule 8 of the Federal Rules of Civil Procedure?

C.

Is the opinion in direct conflict with the case of *General Mills, Inc.,* v. *Goldman,* 184 F. 2d 359 (C. C. A. 8th, 1950) and with Missouri decisions?

Reasons for Granting the Writ.

1. The Court of Appeals did not follow the principles established by the Supreme Court of the United States in holding that provisions of a lease defeating recovery must be affirmatively pleaded in the answer, even though the lease is set out in full by reference in the amended complaint, introduced in evidence by the plaintiffs, and liability predicated upon other provisions of that same lease.

The plaintiffs filed an original complaint which set out the lease in full as Exhibit A. The plaintiffs' amended complaint set out certain provisions of that same lease and incorporated Exhibit A of the original complaint by reference (R. 2). The defendant answered that the amended complaint failed to state facts sufficient to entitle plaintiffs to relief, but did not specify by number the paragraphs of the lease defeating recovery. The plaintiffs then introduced the lease into evidence at the trial (R. 37).

The opinion of the Eighth Circuit Court of Appeals held that the plaintiffs were liable to the landlord's fire insurance companies by reason of paragraphs 2 and 3 of that lease (R. 341). These paragraphs required the tenant to repair. The opinion of the Eighth Circuit then held that other provisions of the lease could not be considered to defeat recovery because "not pleaded in the answer or otherwise asserted in the trial court" (R. 345).

Rule 8 (c) of the Federal Rules of Civil Procedure enumerates the matters that must be affirmatively pleaded.[1] The defense to plaintiff's amended complaint was that it did not state a cause of action. This defense was raised by the defendant.

The Supreme Court has never interpreted Rule 8. The opinion of the Eighth Circuit holds that a defense not classified as an affirmative defense by the Rules or an opinion in any case must nevertheless be affirmatively pleaded. Such an interpretation of the Rules is clearly contrary to the principles established by the Supreme Court.

Those principles of pleading were set forth in the case of *Maty* v. *Grasselli Chemical Co.*, 303 U. S. 197, 58 S. Ct. 745, 82 L. Ed. 507. The court stated as follows (l. c. 200):

> "Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent the achievement of that end."

The principles thus established by the Supreme Court are carried out in Rule 1, which provides that the rules "shall be construed to serve the just, speedy and inexpensive determination of every action."

The risk of loss by fire on the building under the lease was to be carried by fire insurance companies and not

[1] "8 (c) In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, *res judicata*, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense * * *."

by the tenant. Both parties knew this. The lease specifically provided in paragraph 7 as follows:

> "In case of fire, the tenant shall give immediate notice to the landlord who shall thereupon cause the damage to be repaired with reasonable speed * * *"

Paragraph 6 of the lease provided as follows:

> "That the tenant will not itself nor will it * * * permit anything to be brought into said premises, or to be kept therein, which will in anywise increase the rate of fire insurance of said demised premises * * *"

The fire insurance companies were required by their policies to pay the $39,875 whether the fire loss was caused by negligence or not. Standard fire insurance policies require payment of fire loss caused by negligence because most fires are started by negligence.

The Court of Appeals held, however, that these paragraphs of the lease defeating liability were not available to the defendant because not affirmatively pleaded. This holding is contrary to the principles established by the Supreme Court of the United States.

The purpose of Rule 8(c) requiring certain matters to be affirmatively pleaded is to prevent surprise and thus find the plaintiff unprepared to meet with evidence the affirmative matter. The plaintiffs in the present case could not by evidence have avoided the language of the lease. Their remedy was against Midwest which they failed to assert.

Where evidence is introduced by the plaintiff which shows that the plaintiff is not entitled to recover, then failure to plead a matter as an affirmative defense is immaterial.

In the case of *Oscanyan* v. *W. R. Arms Co.,* 26 L. Ed. 539, 103 U. S. 261, the Supreme Court held that illegality, although an affirmative defense, might be relied upon by the defendant to defeat plaintiff's cause of action where it appeared from the opening statement of counsel for plaintiff.

In the recent case of *Carr* v. *National Discount Corporation,* 172 F. 2d 899 (C. C. A. 6th 1949), the plaintiff sued for false arrest. The defendant did not affirmatively plead that it had probable cause for the arrest. The judgment for the defendant based upon probable cause was affirmed. The court held that the defense of probable cause was an affirmative defense but not applicable where plaintiff's own evidence showed the probable cause for the arrest.

The interpretation of Rule 8 is of vital importance to all litigants. The interpretation of that Rule is of fundamental importance in the interpretation of all of the Rules. Is the opinion of the Eigthth Circuit Court of Appeals to stand which holds that litigants are denied their proper defenses because their counsel have failed to plead affirmatively matters which are not required to be affirmatively pleaded under Rule 8(c) or in any decided opinion of any court?

2. The judgment of the Court of Appeals for the Eighth Circuit conflicts with the case of *Anderson & Brown Co.* v. *Anderson,* 161 F. 2d 974 (C. C. A. 7th 1947), in construing Rule 8 of the Federal Rules of Civil Procedure.

Rule 8 of the Federal Rules of Civil Procedure in subparagraph (c) enumerates those matters which must be affirmatively pleaded. The opinion here of the Eighth Circuit holds that provisions of a lease set out by reference in the amended complaint which defeat recovery must be affirmatively pleaded in the answer.

The opinion in the case of *Anderson & Brown Co.* v. *Anderson,* 161 F. 2d 974 (C. C. A. 7th 1947) holds exactly to the contrary. In that case one Brandenburg had the exclusive agency to sell certain magnetic chucks manufactured by the defendant. Brandenburg's contract provided that he was to receive 40% of the sales price of each chuck, but that the price of each chuck was to be later agreed upon between the parties. Brandenburg assigned the contract to the plaintiff company. The plaintiff company filed suit against the defendant for breach of the contract, damages and an injunction. The defendant answered denying performance of the contract and filed two counterclaims. At the trial the court found that the contract was unenforceable because it was vague and indefinite and entered judgment against the plaintiff. The plaintiff appealed and his position was stated by the court as follows (l. c. 976):

> "Appellant asserts that the crux of this appeal is whether or not an uncertainty, rendering a contract unenforceable, is an affirmative defense which must be pleaded * * *"

The court ruled as follows (l. c. 977):

> "* * * It seems clear that it appears from the face of the contract sued upon that at least one element essential to its validity and enforceability was lacking, and that the contract, therefore, furnished the basis for no claim upon which the relief sought could be granted * * *"

If the decision of the Seventh Circuit in the *Anderson* case is correct, then the case of your petitioner was wrongly decided by the Eighth Circuit. There is an irreconciliable conflict between the holding of the two cases.

3. The opinion is in direct conflict with the case of *General Mills, Inc.*, v. *Goldman*, 184 F. 2d 359 (C. C. A. 8th 1950) and Missouri decisions.

In the *General Mills* case the landlord's fire insurance companies sued the tenant for fire loss caused by the negligence of one of the tenant's employees. The court held that the lease relieved the tenant of liability for fire loss. The General Mills lease, set out in the complaint, provided that the tenant would "not use or permit anything upon said premises that will increase the rate of insurance thereon." The General Mills lease also provided that the tenant would return the premises at the end of the term in as good condition "loss by fire and ordinary wear excepted."

The Standard Brands lease provides that the landlord shall repair fire loss. The insurance provision is for all practical purposes identical with that provision in the General Mills lease. Yet based upon a claimed defective pleading, the decisions are absolutely opposite. The Standard Brands opinion makes no mention of the General Mills case decided less than two months previously.

The opinion of the Standard Brands case also holds that the defense of other provisions of the lease had not otherwise been raised in the trial court. At the close of all of the case the defendant moved for a directed verdict (R. 306). This motion called to the court's attention that the terms of the lease precluded recovery. Again after the verdict the defendant filed its motion for judgment, n.o.v. (R. 325). As part of the record the defendant designated its points on appeal in part that the court had erred in failing to sustain the motion for a directed verdict because the fire was caused by incidents insured against by the real parties in interest, the in-

surance companies seeking to recover herein through the plaintiffs (R. 332).

The Standard Brands opinion rules with the dissent of the General Mills case and bases its opinion on an improper interpretation of the Federal Rules and the record.

The opinion is also in conflict with Missouri law. The opinion holds that a tenant obliged to repair under a lease who hires an independent contractor to make the repairs is liable for the fire damage caused by the negligence of the independent contractor while making those repairs. The opinion relies on the case of *Bloecher* v. *Duerbeck,* 333 Mo. 359, 62 S. W. 2d 553 (1933). This case was finally disposed of in 338 Mo. 535, 92 S. W. 2d 681 (1935).

In the *Bloecher* case the defendant owned a building. He employed an independent contractor to install a hot water heater. After the installation was accepted by the landlord, the heater exploded injuring the plaintiff who was a guest of the defendant. Liability was based upon a violation of the landlord's duty to refrain from leaving the premises in a dangerous condition and not upon the negligence of the independent contractor. The court quoting from its earlier opinion stated as follows (l. c. 686):

> "* * * The injury was not to one of the employees of the contractor, or caused to a third person by the negligence of such employee during the course of the work, as to whom and the contractor the relation of master and servant existed. It might be that in such a case the independent contractor alone would be responsible. This accident was the result of a permanent defect in the installation of the heating plant, which would be corrected, if at all, by the owner of the premises. The accident was the

> result of the defective and dangerous condition in which the premises were left after the work of installation of the heating system was completed and it became part of the demised premises and was accepted by the landlord. For this defective and dangerous condition which inhered in the completed work, we think the landlord should be held liable notwithstanding he caused the work to be done by an independent contractor."

The *Bloecher* case is not in point. The liability was there imposed for the violation of the landlord's duty to refrain from leaving the premises in a dangerous condition. Liability was not imposed because of the negligence of an independent contractor.

The Missouri law, universally applied, is stated in the *Restatement of the Law of Torts,* Section 426, as follows:

> "Negligence in the Operative Detail of Doing the Work.
>
> "Except as stated in Sections 427 to 429, an employer of an independent contractor is not liable for bodily harm caused by any negligence of the contractor which does not effect the result which the employer is under a duty to have attained but consists solely in the improper manner in which the contractor does the detail of the work necessary to attain such result."

The illustration used in the Restatement clearly makes the distinction apparent.

> "1. A employs B, a competent contractor, to excavate a cellar on land immediately adjoining a public highway. The contract requires B to provide the fence necessary to prevent pedestrians from falling into the excavation. A is liable to C, a pe-

> destrian, who falls into the excavation because the fence as erected by B is flimsy or because B has not erected the fence as his contract required. A is not liable to D, a pedestrian hurt by the carelessness of B's workmen in handling the timbers while they are erecting the fence or by the careless handling of the tools while so doing."

The case of *Bailey* v. *Zlotnick,* 149 F. 2d 505 (C. C. A. Dist. of Col. 1945) illustrates the doctrine. The court there held the landlord liable to the tenant in damages for injuries caused when a ceiling fell on the tenant. The ceiling fell because an independent contractor in installing a heater let water get on the ceiling. The landlord was held liable not because of the negligence of the independent contractor but because the contractor made the premises unsafe. The landlord was under a duty not to create an unsafe condition. An unsafe condition had been created and therefore the landlord was liable.

The principle involved is set forth in an analysis in 90 A. L. R. 50, where the author quotes from an Ohio case as follows (l. c. 51):

> "* * * The duty was to keep the premises in a reasonably safe condition for the tenant. He is held liable not because of the relation of landlord and tenant alone and because the independent contractor was negligent in doing the work, but because he had become responsible for the unsafe condition in the premises * * *"

Conclusion.

Certiorari should be granted to review the judgment of the Court of Appeals. That judgment construes Rule 8 (c) of the Federal Rules of Civil Procedure by adding a requirement that other defenses must be affirmatively pleaded. The judgment is in conflict with the principles established by the Supreme Court, is in conflict with the *Anderson* case, and is in conflict with the *General Mills* case and Missouri decisions.

Respectfully submitted,

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